

Internal Revenue Service
memorandum

CC:TL:Br3
FJElward

date: **JUN 20 1986**

to: District Counsel, Denver CC:DEN

from: Director, Tax Litigation Division CC:TL

subject: Status of Temporary Regulation 148.1-4

Your memorandum of April 22, 1986, requested technical advice of the status of Temporary Treas. Reg. 148.1-4.

ISSUE

Whether the repeal of former Code section 4294 had the effect of repealing the requirements of Temporary Treas. Reg. 148.1-4, promulgated pursuant to the section, even though the same tax was continued under Code section 4251 and the exemption from communications excise tax formerly in Code section 4294 was continued in Code section 4253(j). Specifically, is the taxpayer required to obtain exemption certificates from organizations described in Code section 501(c)(3) which claim they meet the additional requirements for exemption from the communications excise tax. 4291.00-00; 4253.00-00.

CONCLUSION

Temp. Treas. Reg. section 148.1-4 was promulgated under Code section 4251 and 4294. The same tax is imposed under the same section in current law. Although the exemption was not changed, it was continued only in a section dealing with exemptions from the communications excise tax. Therefore, the temporary treasury regulation retains vitality; however, it would be desirable to remove the litigation potential. We are suggesting that the Legislation and Regulation Division consider promulgating a regulation tailored to the current pattern of the statute.

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FACTS

There is an ongoing examination of the excise tax liability of [REDACTED]. During the examination, a summons was served on [REDACTED] to secure documents showing the extent of [REDACTED]'s compliance with Code section 4291, which requires [REDACTED] to collect the excise tax imposed by Code sections 4251 through 4254. Specifically, the summons sought to determine [REDACTED]'s treatment of claims for exemption by certain 501(c)(3) organizations. Although [REDACTED] resisted compliance with summons, it agreed informally to improve compliance with its obligation to collect communications excise tax. In a document labeled "discussion draft", [REDACTED] asserted, in effect, that it need not obtain exemption certificates for educational organizations claiming exemption from the communications excise tax because the 1976 repeal of former Code section 4294 eliminated the requirement for exemption certificates, contained in former Temporary Treas. Reg. 148.1-4, since the regulation was promulgated pursuant to the repealed section.

The District Director, Denver has requested an advisory opinion on the current status of Temporary Treas. Reg. 148.1-4 in the above context. A number of concerns have been expressed by the district including the concern that if the taxpayer is correct, any agreement with regard to the procedures for determining exemption from the communications excise tax by exempt organizations will be undermined. The district is also concerned that should [REDACTED] fail to collect the tax, the evidence of willfulness will not be as easily obtained if it is not required to obtain the exemption certificates.

DISCUSSION AND RECOMMENDATION

Code section 4251 imposes a tax on communications. The tax has been scheduled to expire at various times in the past, but it was extended at a rate of 3% for the years 1983 through 1987. It is currently due to expire on January 1, 1988; however, in the past it was not allowed to expire. Therefore, it should not be assumed the tax will be allowed to expire, particularly in the current era of concern over large deficits.

Before in 1976, Code section 4294 contained exemptions from various excise taxes, including an exemption from communications excise tax for nonprofit educational organizations. Code section 4294 was repealed by section 1904(a)(10)(d) of the Tax Reform Act of 1976. However, the exemption from communications excise tax was continued by the virtually identical provision of Code section 4253(j).

Temporary Treas. Reg. 148.1-4, dealing with certain excise tax free sales to nonprofit educational organizations, was filed on December 25, 1958 (T.D. 6344). It dealt with various excise tax exemptions as well as the exemption from communications excise tax. It specifically required most organizations exempt from the taxes to file exemption certificates in accordance with forms set out in the regulation.


Since the exemption for nonprofit educational organizations contained in Code sections 4253(j) and 4294 were virtually identical, Treas. Reg. section 49.4253-12 referenced the regulations under Code section 4294 for a discussion of the exemption from communication excise tax provided for nonprofit educational organizations.

Thus the 1976 act did not repeal either the communications excise tax or the exemption for nonprofit educational organizations. Under these circumstances, Temporary Treas. Reg. 148.1-4, to the extent it deals with the exemption of nonprofit educational organizations from communications excise tax, retains its vitality. In other words, persons required to collect communications excise tax are required to obtain exemption certificates from organizations claiming exemption from the communications excise tax as nonprofit educational organizations.

Even though we conclude that Temporary Treas. Reg. 148.1-4 retains its vitality with respect to communications excise tax, we are referring this matter to the Legislation and Regulations Division for a consideration of whether the regulations under Code section 4253 should be amended to conform to the present pattern of the statute. Although the tax is scheduled to expire on January 1, 1988, its history indicates that it may be extended since under the current deficit situation it seems unlikely that the tax will be allowed to expire.

ROBERT P. RUWE
Director

By:


DANIEL J. WILES
Chief, Branch No. 3
Tax Litigation Division

Internal Revenue Service
memorandum

CC:DEN:GL-297-85
JAWeeda

date: APR 2 1986

to: Chief, Tax Litigation Division, Denver

from: Assistant District Counsel, Denver

subject: Status of Temporary Regulation 148.1-4

Our office has received a request for an advisory opinion on the status of Temporary Regulation 148.1-4 from the Denver District. Attorney John A. Weeda of our staff has been in contact with Linda Dettery and Frank Elward regarding the question raised. Because of its potentially far-reaching implications nationally and because it deals with the interpretation of a regulation and thus within the unique expertise of National Office, we are referring it directly to you.

BACKGROUND

This request for advisory opinion came in the context of an ongoing examination of the excise tax liability of [REDACTED], more commonly known as [REDACTED]. During the investigation a summons was served on [REDACTED] to secure documents that would show the extent of [REDACTED]'s compliance with IRC §4291 which requires [REDACTED] to collect the communications tax imposed by IRC § 4251-4254. The more particular focus of that summons was on [REDACTED]'s treatment of the exemption from the tax provided for under IRC §4253(j) for non-profit educational organizations.

THE PROBLEM

[REDACTED] resisted compliance with the summons. In subsequent discussions with the District, [REDACTED] agreed to improve their management of this area of compliance. However, in a letter addressed to the District Director labeled as a "Discussion draft," preliminary to final written understanding, [REDACTED] expressed the opinion that "the regulations prescribe in only two instances (new services and servicemen in

combat zones) that the exemption be documented in certificate form." A copy of that letter is enclosed. [REDACTED] arrived at that conclusion based on the 1976 repeal of IRC §4294 which previously contained the exemption provision for non-profit educational organizations now contained in IRC §4253(j). It argues that repeal made any regulations promulgated thereunder of no effect.

The district is concerned that if that opinion is correct, the agreement would be difficult to enforce and would complicate the assertion of 100 percent penalty provided by IRC §6672 against [REDACTED] in the event it fails to comply. In particular, it may be more difficult to establish willfulness on the part of [REDACTED] if there was no valid regulation describing the method by which the collector of the tax should ascertain whether a particular organization was entitled to an exemption from the communications excise tax. Of course, in the event the regulation is not valid and [REDACTED] failed to comply, the argument could be made that [REDACTED] did not use reasonable means to comply with the requirements of the applicable statutes. The very agreement of [REDACTED] to follow the procedures even though they consider them invalid; would be evidence of their reasonableness and an agreement to be bound by them that could be used to establish willfulness. Obviously, the whole matter would be cleaner if the regulation was determined to be valid and could be used to measure willfulness.

Questions on this matter should be directed to John A. Weeda at FTS 564-4358. We thank you for your attention to this matter.



CHRISTOPHER L. NEAL

March 5, 1986

Internal Revenue Service
District Director
1065 17th Street
Denver, Colorado 80265

Dear Sir:

An examination is currently being conducted of [REDACTED]'s excise tax returns, Forms 720. The principal focus of the audit involves the review of communications excise taxes for all quarters of [REDACTED] for customers in the [REDACTED] billing area.

During the course of the audit the excise tax agent has raised concerns regarding [REDACTED]'s handling of excise tax exemption certificates. These certificates are a series of pre-printed forms that the company uses to obtain information according to Sections 4251 through 4253 of the Code and Regulations that is necessary to determine the exempt status of a customer for communications excise tax purposes. Certificates are obtained from each customer requesting exempt status even though the Regulations prescribe in only two instances (news services and servicemen in combat zones) that the exemption be documented in certificate form.

Specifically, the agent suggested that certain customers were granted exempt status where the organization was not a qualifying organization as defined in Section 4253 of the Internal Revenue Code. This problem was concentrated in religious or other charitable organizations that are exempt under 501 (c)(3) of the Code but do not meet the additional statutory requirements in order to qualify for communications excise tax exemption. In addition, the agent has expressed concerns that certain other customers have been granted exempt status based on incomplete or incorrect data as reflected on completed exemption certificates.

Based on these concerns, the company has initiated certain procedures within their customer contact and review process to attempt to address those areas cited by the agent. Step one was instituted prior to commencement of the excise tax audit while steps two and three are currently being initiated.

These corrective measures are outlined as follows:

1. Beginning in [REDACTED] the business office at [REDACTED] has, and will continue to conduct annual reviews of customers claiming exemption from communications excise taxes. This review will involve mailing to each exempt customer a new exemption certificate requesting that the

certificate be fully completed with all information updated. No response from a customer is treated as a taxable account by the company.

2. In addition, we have designed a questionnaire that has been reviewed by the excise tax agent that is intended to elicit more complete customer responses and thus better enable customer service representatives to evaluate each account requesting exempt status. This questionnaire will be distributed to each exempt customer during the annual review process.

If there are questions concerning this document or if your staff should have additional suggestions they wish to offer concerning the handling of these certificates please contact either [REDACTED] at [REDACTED] or [REDACTED] at [REDACTED].

Sincerely,

[REDACTED]

Director - Corporate Taxes